IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted]74

JOHN FRANCIS PETERS,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

No. [redacted]63

NELSON SIBRON,

Appellant,

—v.—

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF NEW YORK CIVIL LIBERTIES UNION *AMICUS CURIAE*

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INDEX

Table of Authorities

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Interest of *Amicus Curiae*

The New York Civil Liberties Union, which files this brief with the consent of the parties, believes that the two cases at bar raise substantial federal questions under the Fourth and Fourteenth Amendments which should be heard and decided by this Court. The central question raised in each case is whether a police officer may search a suspicious looking person incident to an investigatory questioning of such person where the officer has neither a search warrant nor probable cause lawfully to arrest such person for any crime. In each of these cases, the New York Court of Appeals held that Section 180-a of the N. Y. Code of Criminal Procedure was constitutional and authorized the searches which occurred (18 N. Y. 2d 238, 244). The Court of Appeals further held (18 N. Y. 2d 242), that the searches and seizures involved in these cases were constitutional without regard to Section 180-a of the N. Y. Code of Criminal Procedure, upon the authority of its earlier decision in *People* v. *Rivera*, 14 N. Y. 2d 441 (1964), *cert. den.* 379 U. S. 978 (1965).

For the reasons set forth in this brief, we believe this Court should note jurisdiction so that this central question be fully briefed, argued and decided.

The Federal Questions Are Substantial

1. The federal questions raised in this appeal are of great public importance and concern. The New York statute and court decisions at issue on this appeal are merely examples—although extreme ones—of a growing trend of state statutes and state court decisions authorizing police

to stop, question, and "frisk" or search "suspicious persons" without probable cause to believe that the suspect has committed a crime. Section 180-a of the N. Y. Code of Criminal Procedure is modeled upon the Uniform Arrest Act promulgated more than twenty years ago by the Interstate Commission on Crime. See Warner, "The Uniform Arrest Act", 28 U. Va. L. Rev. 315 (1942). Statutes modeled on the Uniform Arrest Act have been enacted in New Hampshire, Rhode Island, and Delaware. N. H. Laws, §§594:2-3 (1955); R. I. Gen. Laws Ann. §12-7-1 (1965); Del. Code Ann. Tit. 11, §1902 (1953). Similar legislation has also been enacted in Hawaii, Massachusetts and the City of Miami, Florida. Rev. Laws of Hawaii, Tit. 30, ch. 255, §§4-5 (1955); Mass. Gen. Laws ch. 41, §98 (1961); Code of City of Miami, Florida, §43-46 (1957), as amended by Ord. No. 7,367 (1965).

The courts of at least two other states have authorized police to stop and frisk persons on mere suspicion and without probable cause to make an arrest. *People* v. *Mickelson,* 59 Cal. 2d 448, 450-51 (1963) (citing other California cases); *State* v. *Terry,* 5 Ohio App. 2d 122, 214 N. E. 2d 114, 34 Law Week 2458 (Ct. App., Cuyahoga Co. 1966).

The Model Code of Pre-Arraignment Procedure, currently under study by the American Law Institute, contains a "stop and frisk" section similar to N. Y. Code of Criminal Procedure §180-a. (See report of this year's annual meeting of the Institute, 34 Law Week 2641 (5/24/66).) And within the past year similar stop and frisk statutes were considered, although not adopted, by the states of Illinois (H. B. 1078) and Michigan (S. B. 747).

2. The New York statute and case law presented for review on this appeal constitute the most extreme inroads

made by state courts or legislatures to date upon Fourth and Fourteenth Amendment rights. Both Section 180-a and the pre-statutory case law in New York authorize police to stop, question, and "frisk" or search a suspect whenever the policeman "reasonably suspects" that the suspect has committed, is committing, or is *about to commit* a crime. Although in at least one other state similar statutory language has been construed to constitute the equivalent of the recognized constitutional standard of probable cause to make an arrest, *De Salvatore* v. *State*, 52 Del. 550, 163 A. 2d 244, 249 (1960), the New York Court of Appeals in the instant case and in earlier cases has clearly stated that the "reasonable suspicion" required for a stop-and-frisk in New York is a lesser standard than probable cause:

> "And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed." *People* v. *Peters*, 18 N. Y. 2d at 242 quoting from *People* v. *Rivera*, 14 N. Y. 2d at 445.

Moreover, the New York Court of Appeals has clearly defined its standard of "reasonable suspicion" in the broadest possible terms as constituting the mere *intuition* of the experienced police officer:

> "By requiring the reasonable suspicion of a police officer, the statute incorporates *the experienced police officer's intuitive knowledge and appraisal* of criminal activity. *His* evaluation of the various factors involved insures a protective, as well as definitive, standard" 18 N. Y. 2d at 245. (Emphasis added.)

See also the similar definition adopted by the County Court of Westchester County in the *Peters* case, 254 N. Y. Supp. 2d 10, 12 (1964).

Indeed, the opinions of both the Court of Appeals and the County Court in *Peters* strongly imply that a person is protected from detention and search under §180-a only where his activities are "perfectly normal" 18 N. Y. 2d 246; see also 254 N. Y. Supp. 2d at 13.

In short, Judge Van Voorhis accurately defined the scope of §180-a and the New York case law in his dissent in *People* v. *Sibron,* below, as follows:

> "The power to frisk is practically unlimited, inasmuch as whether an officer 'reasonably suspects' that someone is committing, has committed or is about to commit a felony necessarily depends to a large extent upon the subjective operations of the mind of the officer" 18 N. Y. 2d 605.

3. The authorization to police to search a suspect on "reasonable suspicion" or their own intuition is in sharp conflict with the Fourth Amendment's protection against unreasonable searches and seizures as heretofore defined by this Court. This Court has repeatedly held that any search of the person of an accused without a warrant is constitutional only if made incident to a lawful arrest based upon probable cause to believe that the accused has committed a crime. See, e.g., *Aguilar* v. *Texas,* 378 U. S. 108, 112 n.3, 122 (1964); *Ker* v. *California,* 374 U. S. 23, 34-35, 53 (1963); *Rios* v. *United States,* 364 U. S. 253, 261-62 (1960). This Court unequivocally rejected any form of "suspicion" as a standard to authorize any search in *Henry* v. *United States,* 361 U. S. 98, 101-102 (1959):

"As the early American decisions both before and immediately after its [the Fourth Amendment's] adoption show, common rumor or report, *suspicion, or even 'strong reason to suspect'* was not adequate to support a warrant for arrest. And that principle has survived to this day. . . . It was against this background that scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty.' . . . While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, *it must be made with probable cause.*" (Emphasis added.)

4. The Court of Appeals below attempted to justify its authorization of "frisks" upon less than probable cause on the grounds that a frisk—which it defined as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" (18 N. Y. 2d 245)—is a "lesser degree" invasion of privacy than a "full blown search of the person" (18 N. Y. 2d 245). However, the Court of Appeals has most definitely not limited either §180-a or its own decisional authorizations of stops-and-frisks to a mere "frisk" as defined above. In *People* v. *Peters,* officer Lasky's frisk of appellant was completed when he felt a hard object in appellant's pocket and withdrew an opaque envelope from the pocket. Lasky then went further, however, and searched the envelope. Similarly, in *People* v. *Sibron,* below, the Court of Appeals held valid a so-called frisk where "the officer put his hand into the suspect's pocket", 18 N. Y. 2d 604; and in *People* v. *Pugach,* 15 N. Y. 2d 65 (1965), cert. den. 380 U. S. 936 (1965), the Court of Appeals further held that police officers, as part of a so-called frisk, might search a suspect's briefcase.

In any event, the prior decisions of this Court under the Fourth Amendment clearly preclude any constitutional distinction between a "frisk" and a "full blown search". The governing principle that any such invasion of privacy is subject to constitutional protection was clearly held by this Court in *Mapp* v. *Ohio,* 367 U. S. 643, 646-47 (1961), where this Court reaffirmed the following doctrine announced in *Boyd* v. *United States,* 116 U. S. 616 (1886) and *Entick* v. *Carrington,* 19 How. St. Tr. 1030 (1765):

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment" 116 U. S. 630.

It is obvious that a frisk is an invasion into the "privacies of life", "personal security", and "personal liberty" of its

subject, and that, under the *Mapp, Boyd,* and *Entick* decisions, it is this invasion "that constitutes the essence of the offense" while any distinctions of degree which may exist between a frisk and a "full blown search" are merely differences as to the "circumstances of aggravation".

In accord with the foregoing, numerous courts have held that a frisk of an accused for weapons is, for constitutional purposes, indistinguishable from a "full blown search" of the accused's person. *White* v. *United States,* 271 F. 2d 829 (D. C. Cir. 1959); *State* v. *Collins,* 150 Conn. 488, 491-92 (1963); *Ellis* v. *United States,* 264 F. 2d 372, 374 (D. C. Cir. 1959), *cert. den.* 359 U. S. 998 (1959); *People* v. *Esposito,* 118 Misc. 867, 871-72, 194 N. Y. S. 326, 331-32 (Ct. Spec. Sess., 1922).

5. The supposed need for a policeman to frisk or search suspicious persons for the policeman's self-protection cannot justify the invasion of Fourth Amendment rights countenanced by the New York statute and case law brought for review upon the present appeals.

This Court has never heretofore permitted any relaxation of the constitutional requirements for searches and seizure on the grounds of self-defense of the police officer. Any such exception on grounds of expediency would seem markedly inconsistent with this Court's many holdings that fundamental Fourth and Fifth Amendment rights may not be violated in the supposed interests of better law enforcement or greater public safety. E.g. *Miranda* v. *Arizona,* 384 U. S. 436, 479-82 (1966); *Mapp* v. *Ohio,* 367 U. S. 643, 659-60 (1961). As Judge Fuld stated in his dissenting opinion below in the instant case:

> "Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (*People* v. *Rivera*, 14 N. Y. 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)" 18 N. Y. 2d at 248.

Similar doubts as to the law enforcement justification for stop and frisk legislation have been expressed by a justice of the Supreme Court of Michigan. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, J. CRIM. L., C. & P. S. (1966).

Moreover, should this Court conclude that self-defense of the police officer may, under appropriate circumstances, itself constitute constitutional grounds for the officer to search a suspicious person, some definition of the circumstances under which such a self-defense search can be made is unquestionably needed. Although the New York Court of Appeals has rationalized the searches authorized by Section 180-a and by its own prior decisions on the basis of the self-defense needs of the police officer, the Court of Appeals has not limited either Section 180-a or its own pre-statutory decisions to circumstances where a frisk is genuinely necessary for the protection of the policeman.

In the *Peters* case, there is not one shred of evidence that officer Lasky reasonably—or even unreasonably—believed he was in any danger as he held Peters by the collar and questioned him at gun-point. Moreover, any danger that may have existed in that situation was removed at the moment when officer Lasky removed the opaque envelope from appellant's hip pocket. There existed no further possible danger to officer Lasky to justify his opening the envelope and examining its contents. Similarly, in *People* v. *Pugach*, 15 N. Y. 2d 65 (1965) where the police searched the defendant's briefcase before taking the defendant to the police station for questioning, any possible danger to the police from a weapon in the briefcase could have been eliminated by the simple expedient of keeping the briefcase away from the defendant in the front seat of the police car, and no search of the briefcase was necessary. See 15 N. Y. 2d at 71 (Fuld, *J.*, dissenting). As Judge Van Voorhis noted in his dissent in *People* v. *Sibron* in the court below, the authorization to search granted to the police in New York under Section 180-a and related court decisions has been defined so broadly that "the safety of the officer or public from violence is not remotely involved" 18 N. Y. 2d 607.

6. Finally, the search of appellant's person without probable cause cannot be upheld, as the Court of Appeals seemed to do below (18 N. Y. 2d at 244; see also *People* v. *Rivera, supra*, 14 N. Y. 2d at 444-46), on the ground that appellant was merely under investigative "detention" and not under arrest at the time the search occurred.

It might parenthetically be noted that the authority granted a police officer under subsection 1 of 180-a to "stop" a person on reasonable suspicion and "demand of him his name, address, and an explanation of his actions" raises

separate and substantial questions under this Court's recent decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See also Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

However, whether appellant's custody is called an "arrest" or a mere "investigatory detention" is irrelevant in determining the constitutionality of the search of his person without probable cause. The Fourth Amendment, as heretofore construed by this Court, does not merely prohibit searches incident to unlawful arrests; heretofore any search without a warrant, based upon probable cause, has been considered lawful only if made incident to a lawful arrest made upon probable cause. E.g. *Aguilar* v. *Texas*, 378 U. S. 108, 112 n.3, 122 (1964); *Ker* v. *California*, 374 U. S. 23, 34-35, 53 (1963); *Rios* v. *United States*, 364 U. S. 253, 261-62 (1960). There is no authority whatever justifying any search on the basis of its being reasonably incident to an "investigatory detention" made on less than probable cause.

In any event, in the *Peters* case appellant was not merely stopped politely for investigational purposes. On the contrary, officer Lasky "collared" appellant at gun-point. This constituted an assault or, at the very least, an arrest of appellant which was unlawful since it was not based upon probable cause. The undisputed facts of Peters are strikingly similar to the disputed testimony of the taxidriver in *United States* v. *Rios*, 364 U. S. 253, 257-258 (1960) which this Court held would, if believed by the trier of the facts, constitute an unlawful arrest. 364 U. S. at 261-62. See also other definitions of arrest in *Henry* v. *United States*, 361 U. S. 98, 103 (1959); *United States* v. *Scott*, 149 F. Supp. 837, 840 (D. D. C. 1957); *United States* v. *Viale*, 312 F. 2d 595, 601 (2d Cir. 1963).

CONCLUSION

Section 180-a of the N. Y. Code of Criminal Procedure and the rulings of the New York Court of Appeals below empower police to conduct searches and seizures under circumstances not heretofore tolerated by this Court. The decision whether these searches and seizures violate the Fourth and Fourteenth Amendments to the United States Constitution requires full briefing and oral argument before this Court.

Accordingly, it is urged that jurisdiction be noted.

Respectfully submitted,

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